



# California Fair Political Practices Commission

April 20, 1990

Judith Sproul Davis  
Nielsen, Merksamer, Hodgson,  
Parrinello & Mueller  
770 L Street, Suite 800  
Sacramento, CA 95814

Re: Your Request for Informal Assistance  
Our File No. I-90-173

Dear Ms. Davis:

This is in response to your request for advice concerning the duties of your clients California Correctional Peace Officers Association ("CCPOA"), California Professional Firefighters ("CPF") and California Medical Association ("CMA") in making independent expenditures under the Political Reform Act (the "Act").<sup>1</sup>

We note that you have requested formal written advice pursuant to Section 83114(b). We are compelled to issue informal assistance pursuant to Regulation 18329(c)<sup>2</sup> however, because of the hypothetical nature of your questions and the difficulty we have giving a specific response to those questions because slight variations in the facts will require a change in our response. Accordingly, we have been unable to provide more than general guidance in response to several of your questions.

Pursuant to our telephone conversation on April 5, 1990, you extended our time to reply to your inquiry to April 20, 1990. Also, you inquired as to whether your clients could rely upon federal law and Federal Elections Commission advice concerning independent expenditures pending our reply to your letter. I informed you that the differences in federal and California law on independent expenditures and contributions were such that we did not believe reliance on the federal law was advisable.

<sup>1</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

**EXHIBIT F**

QUESTIONS

1. If an organization's broad based political committee makes an expenditure on a candidate, do the following events affect whether the expenditure is an independent expenditure or a contribution?

a. Agents of the organization (or its committee) have invited and met with the candidate to exclusively discuss the candidate's views on issues affecting the organization's members prior to making the expenditure. There is no consultation, coordination or concerted act between the organization or its committee and the candidate subsequent to the meeting.

b. The committee, after meeting with the candidate as set forth in Question 1.a., informs the candidate that it intends to make the expenditure.

c. The committee has made contributions to the candidate in fiscal years prior to the one in which it desires to make the expenditure.

d. The committee has made contributions to the candidate during the same fiscal year to support the candidate's election to a different state or local office.

e. The committee has made contributions to the candidate in the same fiscal year or special election cycle to support the candidate's election to the same office.

f. The committee is under contract with a consultant or pollster whose services were used by the candidate in prior fiscal years.

g. The committee has requested and received any of the following materials from the candidate prior to making the expenditure:

- A photograph of the candidate.
- A copy of the candidate's official biography.
- A copy of the candidate's statement distributed to the press in connection with his or her announcement of candidacy.
- Copies of any other press release distributed by the candidate.
- Copies of the text of speeches made by the candidate.
- Copies of the candidate's position papers which have been published or distributed to the public.

- Copies of press clippings about the candidate.
  - Polling data regarding the candidate which has been released to the press.
  - h. The candidate has made an unsolicited request that the committee make such an expenditure.
  - i. The candidate has made an unsolicited request for the committee's "support."
  - j. Political party leaders (or their agents) have made an unsolicited request that the committee make such an expenditure or "support" the candidate.
  - k. Political party leaders or legislative leaders (or their agents) have sent the committee unsolicited promotional materials concerning the candidate.
  - l. The candidate has sent the committee unsolicited promotional materials concerning himself or herself.
  - m. The committee has coordinated the expenditure with an expenditure on the same candidate by another person or committee.
  - n. A member of the committee's organization, who has had no involvement in the committee's decision to make the expenditure, has rendered volunteer personal services to the candidate's campaign.
2. Has an independent expenditure or contribution been "made" if the committee expends money on a mailing or other communication which advocates the election of a candidate, but the communication is never sent or broadcast?
3. Under the facts set forth in Question 2, if an independent expenditure has been "made", is notice of the expenditure required under Section 85604?
4. How should the expenditure or contribution described in Question 2 be reported?

#### CONCLUSIONS

1. When an organization's broad based political committee makes an expenditure in connection with a communication that clearly identifies and expressly advocates support for a candidate, and the expenditure is not made at the behest of that candidate or his or her agent, it makes an independent expenditure. When the committee makes an expenditure for a political purpose and does so at the behest of a candidate, it makes a contribution to the candidate. Contributions to a candidate by a broad based political committee are limited to

\$5,000 each fiscal year.<sup>3</sup> There is no limit on how much a broad based political committee can make in independent expenditures to support a candidate.

a. There is no contribution to a candidate when the organization or its committee interviews the candidate exclusively on issues affecting the organization's members and the committee subsequently makes an expenditure to support the candidate, as long as the committee does not communicate with the candidate or the candidate's agents concerning how or when the expenditure will be made.

b. Based upon facts in Question 1.a., if the committee merely communicates to the candidate that it intends to make the independent expenditure, the expenditure is not transformed into a contribution.

c., d. and e. The fact that the committee has made prior contributions to a candidate does not, in and of itself, prevent the committee from making independent expenditures to support the candidate or transform the expenditures into contributions. The expenditures are not limited in amount and remain independent expenditures as long as they are not made at the candidate's behest.

f. The fact that the committee is under contract with a consultant or pollster who has rendered services to a candidate in prior fiscal years does not, in and of itself, prevent the committee from making independent expenditures to support the candidate or transform such expenditures into contributions. The expenditures are not limited in amount and remain independent expenditures as long as the consultant or pollster is not acting as the candidate's agent in consulting with or advising the committee in connection with them.

---

<sup>3</sup> Pursuant to a preliminary injunction currently in effect in the matter of Service Employees International Union, et al. v. Fair Political Practices Commission, U.S. District Court, Eastern District of California, Case, No. CIVS 89-0433, the Act's contribution limits do not apply when a union or membership organization makes an expenditure to communicate solely with its members, even though the expenditure may be a reportable contribution under the Act. A final ruling in this case is expected in April or May 1990. Please contact the Commission if you wish to be apprised of the status of the case.

g. When the committee solicits and receives materials from a candidate and subsequently makes an expenditure to disseminate all or part of the materials in support of the candidate or in opposition to his or her opponent, the expenditure is a contribution to the candidate. This would be pertinent to any of the materials or information listed in Question 1.g. above. However, it is not a contribution to the candidate if the committee makes an expenditure to disseminate information contained in the materials and the committee does not otherwise communicate with the candidate or the candidate's agent concerning how or when the expenditure will be made.

h., i. and l. When a candidate makes an unsolicited request to the committee for "support" or that the committee make an expenditure on his or her behalf, or when the candidate sends unsolicited materials to the committee, the committee makes a contribution to the candidate if it subsequently makes an expenditure relating to the candidate, unless the committee can show specific facts that the candidate had no involvement in the expenditure, i.e., that it did not communicate with the candidate or the candidate's agent concerning how, when or whether the expenditure will be made.

j. Following an unsolicited request from political party leaders (or their agents) that the committee "support" the candidate or make an expenditure relating to the candidate, the committee makes no contribution to that candidate if all of the following apply:

- The committee makes an expenditure relating to that candidate.
- The party leader is not acting as the agent for the candidate.
- The committee does not communicate with the candidate or the candidate's agent concerning how or when the expenditure will be made.

Likewise, there is no contribution by the committee to the political party of the person requesting the expenditure (or the person himself if he is a candidate) unless the expenditure, when made, can be reasonably foreseen to result in a clear political benefit to that party (or party leader if he is a candidate).

k. When political party or legislative leaders (or their agents) send the committee unsolicited promotional materials concerning the candidate, and the committee subsequently makes an expenditure to disseminate all or part of the materials in support of the candidate or in opposition to his or her opponent, the expenditure is a contribution to

the candidate if the political party or legislative leader are agents for the candidate. It is not a contribution if the committee makes an expenditure to disseminate information contained in the materials and the committee does not otherwise communicate with the candidate or the candidate's agents concerning how or when the expenditure will be made.

There is no contribution to the political party, or person making the request (if that person is a candidate), unless the dissemination of the materials, when made, can be reasonably foreseen to result in a clear political benefit to that party or person.

m. When two or more entities coordinate their independent expenditures on the same candidate they do not make contributions to one another unless an expenditure, when made, can be reasonably foreseen to result in a clear political benefit to another of the entities. This advice does not apply where two or more entities share the cost of a "product" such as a television or radio advertisement. In such a case there is no contribution if each entity pays its equal share of the cost of the "product."

n. Volunteer personal services rendered to a candidate by a member of the committee's organization do not, in and of themselves, make committee expenditures on behalf of the candidate contributions. Such expenditures will be independent expenditures as long as the committee does not communicate with the candidate or his or her agent concerning how or when the expenditure will be made. Rendering volunteer personal services to the candidate does not, by itself, make the member of the committee's organization the candidate's agent.

2., 3. and 4. An expenditure on a communication that otherwise would have been an independent expenditure is not an independent expenditure if the communication is never sent or broadcast. Therefore, no notice is required pursuant to Section 85604. Such an expenditure should be itemized on Schedule E of Form 420 and described as a communication, not at the behest of a candidate, that was never transmitted. An expenditure on a communication that otherwise would have been a contribution remains a contribution whether or not the communication is sent or broadcast.

#### FACTS

The CCPOA is a union of state correctional peace officers whose approximately 19,000 members voluntarily contribute to the CCPOA's political action committee. The CPF is a labor organization comprised of approximately 17,000 professional firefighters whose members voluntarily contribute to the CPF's political action

committee. The CMA is a professional association of California physicians. Approximately 9,000 CMA members voluntarily contribute to the CMA's political action committee. Each of these organizations' political action committees qualify as broad based political committees pursuant to Section 85102(d).<sup>4</sup>

None of these organizations, either through their political action committees or otherwise, has in the past made independent expenditures for or against candidates. However, each organization is currently considering doing so.

#### ANALYSIS

Section 82031 defines independent expenditure as:

[A]n expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.

Section 82015 defines contribution, in pertinent part, as:

[A] payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received unless it is clear from the surrounding circumstances that it is not made for political purposes. An expenditure made at the behest of a candidate, committee or elected officer is a contribution to the candidate, committee or elected officer unless full and adequate consideration is received for making the expenditure.

Independent expenditures and contributions thus have two primary differences. The first is that an independent expenditure is not made to or at the behest of a candidate, while a contribution is. Regulation 18215(b) defines "made at the behest" as:

---

<sup>4</sup> Section 85102(d) defines a broad based political committee as "a committee of persons which has been in existence for more than six months, receives contributions from one hundred or more persons, and acting in concert makes contributions to five or more candidates."

[A] payment made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, or at the request or suggestion of a candidate, controlled committee, official committee of a political party, or organization formed or existing primarily for political purposes.

The second difference is that an independent expenditure must be made in connection with a communication that expressly advocates the election or defeat of a clearly identified candidate, while an expenditure that does not meet this requirement will still be a contribution if it is made at a candidate's behest.<sup>5</sup>

If an expenditure is an independent expenditure there is no restriction on its amount. However, it must be properly reported (see Section 84203.5) and notice of the maker of the expenditure, or the expenditure itself, is sometimes required (see Sections 85600 and 85604).

If an expenditure is a contribution there are restrictions on its amount. Depending on who is making and receiving the contribution, and the period during which the contribution is made, its maximum amount may be \$1,000, \$2,500 or \$5,000. (See Sections 85301-85303 and 85305.) Broad based political committees, such as the political action committees for CCPOA, CPF and CMA, may contribute as much as \$5,000 to a candidate during a fiscal year (Section 85303(b)), and during a special election and special runoff election cycle (Section 85305(c)(3)).

A. Whether Committee Expenditures Are Made at the Behest of a Candidate.

Most of the questions posed in your letter focus upon certain interactions between an organization (or its political action committee) and a candidate. You ask whether these interactions, in conjunction with subsequent expenditures by the political action committee which support the candidate, make the expenditures independent expenditures or contributions to the candidate. At the core of these questions is whether, under the specific circumstances described, the expenditures are made at the behest of the candidate. If they are, then the expenditures are contributions and subject to the Act's contribution limits. If they are not, then the expenditures may be independent expenditures and are not limited in amount.

---

<sup>5</sup> An expenditure (defined in Section 82025) that is not made at the behest of a candidate and which is not in connection with a communication that clearly identifies a candidate and expressly advocate the candidate's election or defeat is neither a contribution nor an independent expenditure. These expenditures must be reported on Schedule E of Form 420.



1. Meeting with the candidate.

In the Rutberg Advice Letter, No. A-87-292 (copy enclosed), the Commission staff considered whether a committee interview of and subsequent expenditure communicating its endorsement of a candidate constituted a contribution to that candidate. The letter concluded that the expenditure was a contribution because the candidate completed a questionnaire from the committee, attended an interview with the committee and was told by the committee that a mass mailing endorsing his candidacy was under consideration prior to when the expenditure was made.

In this letter we reconsider the advice given in the Rutberg letter. Pursuant to Regulation 18215(b), an in-kind payment is made at the behest of a candidate when it is made under his control; at his direction; in cooperation, consultation or coordination with him; or at his request or suggestion. When a candidate merely meets with a committee's representatives to discuss issues important to members of the organization which sponsors the committee, even with the knowledge that the committee may support him,<sup>6</sup> but there is no discussion of how or when expenditures for the support (or opposition to the candidate's opponent) will take place, the candidate has neither controlled or directed the expenditure, nor has he consulted or coordinated with the committee concerning the expenditure.

Arguably, the candidate has cooperated with the committee in the sense that he has made himself available to be interviewed. Again, however, there must be a more direct connection between the candidate's interacting with the committee and the expenditure itself before the expenditure has been made at his behest. Attending the interview and discussing issues only does not establish this connection.

Consequently, when a committee makes an expenditure supporting the candidate (or opposing the candidate's opponent) following such a meeting, the expenditure is an independent expenditure and not a contribution.<sup>7</sup>

---

<sup>6</sup> A candidate's knowledge or a acknowledgment of a committee's activities supporting him is one factor to consider in determining whether the committee's expenditures are independent expenditures or contributions, but does not control. (Mountjoy Advice Letter, No. I-89-426, copy enclosed.)

<sup>7</sup> The Commission staff has rendered previous advice that when an organization makes expenditures on an event in which one or more candidates appear before the organization's members and/or members of the public, there is a contribution to those candidates if the event is not open to all candidates on a nonpartisan basis. (Lippert Advice Letter, No. A-87-172, copy enclosed.) The current advice letter does not alter that advice.

Finally, if the organization or its committee later informs the candidate of its decision to make the expenditure, but does not communicate with or receive information from the candidate as to how and when the expenditure will be made, the expenditure remains an independent expenditure.

2. Prior contributions to the candidate.

Under the Act, a contributor is not prohibited from making both contributions to and independent expenditures on a candidate, regardless of their timing, so long as the contributions comply with the Act's contribution limits.

Therefore, as long as an expenditure on a candidate is truly independent and not at a candidate's behest, a committee can make independent expenditures on the candidate at any time without reference to previous contributions to that candidate. Prior contributions to the candidate may be a factor in determining whether or not an expenditure is made at a candidate's behest, but they do not by themselves transform an otherwise independent expenditure into a contribution.<sup>8</sup>

3. Use of same consultant or pollster.

As with prior contributions to a candidate, a committee's use of the same consultant or pollster used by a candidate in prior years does not, in and of itself, transform committee expenditures which support the candidate into contributions. If the consultant is under contract with the candidate and the committee at the time the expenditures are made, there is a strong inference that the expenditures are being coordinated by the candidate and are thus being made at his or her behest. However, the consultant's prior employment alone does not transform an otherwise independent expenditure into a contribution.

4. The committee requests materials from the candidate.

Where a committee requests materials (such as those itemized under Question 1.g. above) from a candidate and subsequently makes an expenditure to disseminate all or some of the materials, it makes a contribution to the candidate. This is because the candidate, through the materials, exercises an element of direction or control over the expenditure. (See Regulation 18215(b).)

---

<sup>8</sup> See, however, Section 85602, as added by Proposition 68. The Commission has taken the position that this section was superseded by Proposition 73. (In re Beel 11 FPPC Ops. 1; Taxpayers to Limit Campaign Spending v. FPPC, Case No. B039177, Court of Appeal, Second District (review by Supreme Court pending).)

On the other hand, where the committee merely utilizes information from the materials and makes an expenditure to disseminate the information, it has not made a contribution to the candidate. This is because the candidate has minimal, if any, control over or involvement with the expenditure.

5. Requests for the committee's support.

Where a candidate requests that a committee make an independent expenditure or "support" him and the committee subsequently makes such an expenditure, we ordinarily would presume that the expenditure is a contribution. If the committee can show that it merely received a request from the candidate, but completely independently decided to make the expenditure, and had no communication with him (or his agent) concerning how, when, or whether the expenditure will be made, then the expenditure would not be a contribution.

When a similar request is made by a political party leader, there is no contribution to the candidate if the party leader is not acting as the candidate's agent in making the request and, as described above, no direct connection between the request and the making of the expenditure.

Additionally, there is no contribution to the political party of the leader (or the leader himself if he is a candidate) who makes the request unless the expenditure, when made, can be reasonably foreseen to result in a clear political benefit to that party or party leader if he is also a candidate. An expenditure on a communication that makes reference to the candidate alone does not clearly benefit the political party or the political party leader who requested the support.

6. The committee receives unsolicited materials.

When the committee receives unsolicited materials from a candidate and subsequently makes an expenditure to disseminate some or all of them, it makes a contribution to the candidate. As in the situation where the committee solicited the materials, there is an element of candidate direction or control in such an expenditure. However, where the committee utilizes information from the unsolicited materials, but not the materials themselves, in making the expenditure, there is no contribution because the candidate has minimal, if any, control or involvement with the expenditure.

As under paragraph A.5. above, whether the committee makes a contribution to the candidate when a political party or legislative leader supplies the materials depends on whether that person is acting as the candidate's agent as well as on the use made of the materials. Also, there is no contribution to the party or

legislative leader who sends the materials unless the materials are disseminated and, when disseminated, can be reasonably foreseen to result in a clear political benefit to that party or leader.

7. Organization's member renders volunteer personal services to candidate.

When a member of an organization renders volunteer personal services to a candidate and has no involvement in the activities of the organization's political action committee, his or her volunteer services do not transform an independent expenditure by the committee which supports the candidate into a contribution to the candidate.

B. Whether Coordinated Independent Expenditures Are Contributions

You ask whether a committee can coordinate its independent expenditures on a particular candidate with those by other individuals or entities. Presumably, you desire to know whether such activity would result in a contribution to the individual or entity, and vice versa. Also, in analyzing this question, we assume that these entities ultimately will make their expenditures separately and will not be "pooling" their money to create a specific "product" such as a television or radio advertisement.<sup>9</sup>

Underlying the concept of a contribution is the assumption that it will somehow result in a political benefit to its recipient. When two or more entities coordinate their expenditures to benefit a certain candidate, that fact alone does not create a sufficient benefit so that each of the coordinating entities have made a contribution to each of the other coordinating entities. The question is whether the expenditure, when made, can be reasonably foreseen to result in a clear political benefit to the other entities. If the expenditure meets this standard, then it becomes a contribution.

C. Whether Expenditures on a Communication That Is Never Sent or Broadcast Are Contributions, Independent Expenditures or Neither

An independent expenditure is not made when the material created by the expenditure is never transmitted, sent or broadcast.

---

<sup>9</sup> Where two or more entities "pool" their funds to produce a "product" for political purposes they do not make contributions to each other as long as they share equally in the cost of the product. (See Olson Advice Letter, No. A-90-118, copy enclosed.)

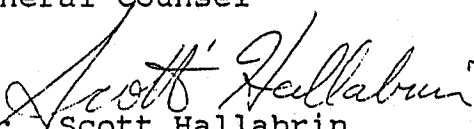
Section 82031 requires that a communication take place in order for an independent expenditure to be made. If the communication does not occur, there is no independent expenditure. Therefore, there is no requirement for the notices concerning such an expenditure under Sections 85600 and 85604. Such an expenditure should be itemized on Schedule E of Form 420 and described as a communication, not at the behest of a candidate, that was not transmitted.

However, the same is not true for a contribution. Where the committee, at the behest of a candidate, expends funds on a communication which is ultimately not sent, an expenditure at the behest of a candidate, and, therefore, a contribution, has still taken place. (See Section 82015.)

I hope that this reply will be helpful in assisting you to advise your clients. Should you have any questions, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan  
General Counsel

  
By: Scott Hallabrin  
Counsel, Legal Division

KED:SH:ld

Enclosures